**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

IN RE: ANTOINETTE KITCHEN,	)	Chapter 13
Debtor.	)	Case No.: 16-11359-BFK
ANTOINETTE KITCHEN,	)	
Plaintiff,	)	A.P. No. 16-01191
v.	)	
WELLS FARGO BANK, NA d/b/a WELLS FARGO DEALER SERVICES,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE EXPERT WITNESS

Wells Fargo Bank, NA, d/b/a Wells Fargo Dealer Services ("***WFDS***"), through the undersigned counsel, hereby files this Memorandum in Support of Motion to Exclude Expert Witness, and states as follows:

Summary of Argument

On February 1, 2017, Plaintiff filed an Application by Debtor's Counsel for Approval and Payment of Attorney's Fees and Costs (Dkt. No. 23) (the "Motion for Fees"), which was accompanied by a "Notice of Intent to Use Expert Witness in Support of application for Attorney Fees and Costs." Dkt. No. 23-3. The deadline for identifying expert witnesses and providing a Fed. R. Bankr. P. 7026(a)(2) report in this case was December 12, 2016. The purported notice of intent to use an expert is (1) late and (2) still does not comply with the disclosure requirements under the Bankruptcy Rules and Local Rules. As attorney's fees are a component of the actual damages sought in the complaint, nothing about the procedural posture of this case relieved her of the duty to comply with this deadline. Accordingly, Plaintiff should be precluded from presenting any expert testimony at the hearing on March 21, 2017.

Factual and Procedural Background

Plaintiff initiated this adversary proceeding by filing a Complaint Against Defendant Violation of Automatic Stay By Willful Failure to Correct Vehicle Title (the "***Complaint***") on October 7, 2016. Although the Complaint does not state any specific cause(s) of action, it contains the following prayer for relief:

> WHEREFORE Debtor prays that this Court will enter an order requiring Wells Fargo to fix Debtor's title within 24 hours, to award Debtor punitive damages in an amount of $100,000, award attorney's fees and for any and other relief this Court deems equitable and just.

Complaint, Dkt. No. 1, p. 4. Without question, attorney's fees are a part of the specific relief sought in the Complaint.

A Summons and Notice of Pretrial Conference was issued on October 12, 2016 (Dkt. No. 3. That same day, the Court issued an Initial Scheduling Order (Dkt. No. 4). According to the Initial Scheduling Order (the "***Scheduling Order***"), the "parties shall make the expert witness disclosures required by F.R.Civ. P. 26(a)(2) except rebuttal expert witness disclosures, not later than 60 days after issuance of the summons." (Dkt. No. 4, ¶ 4.b). As the summons was issued on October 12, 2016, any expert disclosures (other than rebuttal disclosures) were due on December 12, 2016.

Local Rule 7026-1(L) also required the expert disclosures by December 12, 2016. This rule provides that "[i]n adversary proceedings, the disclosures required by FRBP 7026 shall first be made by the plaintiff not later than 60 days before the date set for completion of discovery." LBR 7026-1(L)(2)(a). In this case, the Scheduling Order provided for the completion of discovery within 120 days after issuance of the summons. (Dkt. No. 4, ¶ 4(c)). Again, the deadline was December 12, 2016.

Plaintiff did not identify an expert witness or provide Fed. R. Bankr. P. 26(a)(2) disclosures by December 12, 2016. The deadline expired.

On December 22, 2016, WFDS served and Offer of Judgment on Plaintiff. On January 4, 2017, Plaintiff filed a Notice of Settlement Agreement (Dkt. No. 19). On February 1, 2017, Plaintiff filed the Motion for Fees. Plaintiff filed an Amended Motion for Fees on February 16, 2017. (Dkt. No. 36). Both the Motion for Fees and Amended Motion for Fees contained notices of intention to use an expert witness; however, Fed. R. Bankr. P. 26(a)(2) disclosures have not been filed or served.

A hearing on the Motion for Fees has been scheduled for March 21, 2017.

Argument

Plaintiff should be precluded from offering any expert or opinion testimony at the hearing on the Motion for Fees because she failed to provide disclosures in a timely manner (and still has not provided any disclosures). The Scheduling Order and Local Bankruptcy Rules established a deadline of December 12, 2016 for Plaintiff to serve expert disclosures. Having ignored this deadline, Plaintiff should not be permitted to name an expert at this late date.

It does not matter that the Motion for Fees was filed following the filing of the Offer of Judgment. Plaintiff sought attorney's fees and costs as a component of the damages in her Complaint. Indeed, attorney's fees are the only component of actual damages sought in the Complaint. If this case had gone to trial, Plaintiff's failure to provide timely expert disclosures most likely would have resulted in the exclusion of any expert testimony to support Plaintiff's claim for fees. In the Motion for Fees, Plaintiff seeks the exact same fees (such as for filing the complaint and unsuccessful motion for preliminary injunction) under the exact same rationale (11 U.S.C. § 362(k)(1)) as in the Complaint. Having previously ignored the deadline and waived the right to offer expert testimony, she should not be permitted to do so now. To allow otherwise would be prejudicial to WFDS, which has not received expert disclosures or had an opportunity to conduct expert discovery (and submits that neither are permitted or appropriate at this late date).

The untimely notice of the "intent" to offer expert testimony is another example of Plaintiff's counsel's improper multiplication of these proceedings and is the exact type of "cottage industry" satellite fee litigation that the courts have cautioned against. See *In re Seaton*, 462 B.R. 582, 604 (Bankr. E.D. Va. 2011).

Conclusion

For all of these reasons, the Court should exclude any expert or opinion testimony on behalf of Plaintiff at the hearing on the Motion for Fees.

Respectfully submitted,

/s/ J. David Folds

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF.

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